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No. [illegible]

IN THE

Supreme Court of the United States

No. 134, TERM 57

Paul L. Willits, William C. Morris, et ux, Township of Concord, Joseph B. Quig, et ux, Basil C. Clare, et ux, Charles R. Johnson, Minshall P. Sharpless, Arthur N. Sanborn, et ux, George A. Kinney, et ux,

Appellants,

v.

Pennsylvania Public Utility Commission,

Appellee,

Philadelphia Electric Company,

Intervening Appellee

On appeal from the Pennsylvania Supreme Court

JURISDICTIONAL STATEMENT

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PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA

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Appellants,

v.

Pennsylvania Public Utility Commission,

Appellee,

Philadelphia Electric Company, Intervening Appellee

No. term

JURISDICTIONAL STATEMENT.

OPINION BELOW.

1. (a) REFERENCE TO OPINIONS.

A reference to the opinions delivered in the Courts below are as follows:

(1) Pennsylvania Public Utility Commission Order #82294 dated August 20, 1956. Nine separate orders were issued by the Pennsylvania Public Utility Commis-

sion since proceedings were brought against the appellants individually. However, only one of the orders is printed and annexed hereto as Appendix A since the orders are substantially the same in all.

(2) A copy of the Superior Court opinion is annexed hereto as Appendix B.

(3) The Supreme Court of Pennsylvania refused to hear Appellants' appeal and that order is also annexed as Appendix C.

JURISDICTION.

1. (b) (i) This is an appeal from the Orders of the Superior and Supreme Courts of Pennsylvania affirming the Orders of the Pennsylvania Public Utility Commission pursuant to 28 U. S. C. 1257, sub-section 2.

1. (b) (ii) The Pennsylvania Public Utility Commission Orders are as follows:

Willets	#82298	June 4, 1946
Morris	82291	June 18, 1956
Concord Township	82291	June 18, 1956
Quig	82294	August 20, 1956
Clare	82505	August 7, 1956
Johnson	82652	August 6, 1956
Sanborn	82554	September 4, 1956
Sharpless	82295	September 4, 1956
Kinney	82296	September 4, 1956

These orders are sought to be reviewed. The Order of the Pennsylvania Superior Court dated December 28, 1956, which appellants contend is erroneous in 12 instances, and the Order of the Pennsylvania Supreme Court dated February 28, 1957 are sought to be reviewed.

A "Notice of Appeal to the Supreme Court of the United States" was filed on March 27, 1957 in the Supreme Court of Pennsylvania.

1. (b) (iii) The statutory provisions believed to confer jurisdiction on the Supreme Court of the United States is the 14 Amendment of the United States Constitution. Appellants have been deprived of procedural due process, substantive due process and the equal protection of the law.

1. (b) (iv) Cases believed to sustain the jurisdiction are as follows:

U. S. *v.* Shaugnessy, 74 S. Ct. 499;
Railroad Comm. of California *v.* Pacific Gas and Electric, 302, U. S. 388, 58 S. Court 334, page 35;
N. L. R. B. *v.* Burns, et al, 207 F. 2nd 434;
Ohio Bell Telephone *v.* PUC, 301 U. S. 292 at 304-305;
I. C. C. *v.* Louisville & Nashville R. R. Co., 227 U. S. 88-91, 33 S. Ct. 185;
St. Joseph's Stock Yard Co. *v.* U. S., 298 U. S. 38, 51-73;
Schactman *v.* Dulles, 225 F. 2nd 938;
Denver & S. L. Ry. Co. *v.* Moffet Tunnel Improvement Dist. 35 F. 2nd 365;
Boise Development Co. *v.* Boise City, 167 Pac. 1032 at 1034;
Wentz *v.* Phila., 301 Pa. 261-151 Atl. 883;
Pa. Mut. Life Ins. Co. *v.* Phila., 242 Pa. 47;
Walters *v.* City of St. Louis, 74 S. Ct. 505;
Howard Sports Daily *v.* Weller, 18 A. 2nd 210;
Karihers Petition, 284 Pa. 455 at 470.

1. (b) (v) The validity of the following Pennsylvania state statutes are involved: 1889, May 8, P. L. 136, section 2 and 4, 15 Purdon's Statutes 1181 *et seq.*

Sec. 2 (15 P. S. 1181)

"Companies incorporated under the provisions of this act, for the supply of light, heat and power, or

any of them, to the public by electricity shall from the date of the letters patent creating the same, have the powers and be governed, managed and controlled as follows:

Every such corporation shall have the authority to supply light, heat and power, or any of them, by electricty, to the public in the borough, town, city or district where it may be located, and to such persons, partnerships and corporations, residing therein or adjacent thereto, as may desire the same, at such prices as may be agreed upon, and the power also, to make, erect and maintain **the necessary buildings, machinery and apparatus** for supplying such light, heat and power or any of them, and to distribute the same, with the right to enter upon such public street, lane, alley or highway for such purpose, to alter, inspect and repair its system of distribution: Provided, that no company which may be incorporated under the provisions of this act shall enter upon any street in any city or borough of this commonwealth, until after the consent to such entry, of the councils of the city or borough in which such street may be located, shall have been obtained".

Sec. 4, as amended by the Act of 1921, (15 P. S. 1182)

"Every corporation heretofore or hereafter incorporated for the purpose stated in section two of the Act to which this is a supplement, and every corporation which has heretofore accepted the provisions of said Act as provided in section three thereof, shall, in addition to, and without impairment or limitation of, any of their present rights and powers, and for the purpose of supplying light, heat, and power, or any of them, by means of electricity, to the public in the borough, town, city, or district where it may be located, and to such persons, partnerships, and

corporations residing therein or adjacent thereto as may desire the same, have the following rights and powers:

(a) *to purchase, construct, erect, operate or maintain necessary plants, works, equipment, and facilities for the generation of electric light, heat and power,* or any of them, or for the transmission or distribution thereof.

(b) *To appropriate property,* outside the limits of public streets, lanes, alleys, or highways, and within the borough, town, city, or district where it may be located, *necessary for its corporate use in the construction, erection, operation, or maintenance* of its buildings, machinery, apparatus, plants, works, equipment, and facilities for generating electric light, heat, and power, or any of them, for the transmission or distribution thereof, except that streams, rivers, or waters of this commonwealth, or any of them, or the land covered thereby, or other public property, or property of a public service company, or property used as a burying-ground or place of public worship, or a dwelling house or the reasonable curtilage, not to be less than three hundred feet, appurtenant thereto, shall not be appropriated by virtue of the power conferred by this subsection; provided, that, for the purpose of transmission or distribution of electric light, heat, and power, or any of them, land covered by the streams, rivers or waters of this commonwealth, or any of them, may be appropriated by virtue of said power; and provided further, that before any such company shall exercise the power conferred by this subsection, the Public Service Commission of the Commonwealth of Pennsylvania, upon application of such company, shall have found and determined, after public hearing, that the service to be furnished by said company through the exercise of said power is necessary or proper for the service, accommodation,

convenience, or safety of the public. All damages arising from any exercise of the power conferred by this subsection shall be ascertained, recovered, and paid as provided by the forty-first section of the Act approved April twenty-ninth, one thousand eight hundred and seventy-four (Pamphlet Laws, seventy-three) and the amendments and supplements thereto.

That section of the Second Class Township Law, May 1, 1933, P. L. 103 as amended, 53 P. S. 19093.2201 is as follows:

"This act shall not repeal or modify any provisions of the Public Utility Law."

1. (c) *The Questions presented by Appeal Are:*

(1) Where a challenge was made as to the necessity for the appropriation of the land for which the application was made by the utility company were the appellants deprived of due process of law when the Pennsylvania Public Utility Commission failed and refused to adjudicate and pass upon the question of whether or not the land applied for by the utility was necessary to accomplish the public or corporate purpose?

(2) Where a challenge was made as to the necessity for the equipment (steel towers) proposed to be used by the utility, were the appellants deprived of due process of law when the Public Utility Commission failed and refused to adjudicate and pass upon the question of whether or not the equipment proposed by the utility was necessary for the accomplishment of the public or corporate purpose?

(3) Were the appellants deprived of due process of law when the Superior Court of Pennsylvania and the Supreme Court of Pennsylvania failed and refused to correct the neglect and refusal of the Public Utility Commission to pass upon the evidence submitted and the questions raised?

(4) Were the appellants deprived of due process of law when the right to take their land was granted by the Public Utility Commission and later with the approval of the Pennsylvania Superior and Supreme Courts although the utility offered no proof to sustain the *amount* of land for which the appropriation was sought?

(5) Is the Act of May 8, 1889, P. L. 136, section 2, 3 and 4 as amended by the Act of May 21, 1921, P. L. 1057, section 1, 15 P. S. section 1182 invalid and repugnant to the 14th amendment of the United States Constitution in that it permits the taking of the appellants' freedom and property without proof by a utility company that the land applied for is necessary to accomplish the public or corporate purpose.

(6) Is the Act of May 8, 1889, P. L. 136, section 2, 3 and 4 as amended by the Act of May 21, 1921, P. L. 1057, section 1, 15 P. S. section 1182 invalid and repugnant to the 14th Amendment of the United States Constitution in that it permits the Public Utility Commission to grant to a utility the right to take the appellants' property wthout adjudicating or passing upon the evidence produced and the issues raised to show that the amount of land applied for and the equipment proposed to be used by the utility was not necessary to accomplish the public or corporate purpose?

(7) Is not that section of the Second Class Township Law, May 1, 1933, P. L. 103 as amended, 53 P. S. 19093.2201 which is as follows:

> "This act shall not repeal or modify any provisions of the Public Utility Law."

invalid and repugnant to the 14th Amendment of the United States Constitution in that it deprives the appellants of the due process and equal protection of the law, and subsidiary thereto is not the Concord Township ordi-

nance dated September 21, 1954 requiring transmission lines in excess of 12,000 volts to be placed underground a valid and binding ordinance?

1. (d) STATEMENT OF CASE.

The Philadelphia Electric Company is desirous of building an aerial high tension transmission line across the appellants' land. The appellants do not challenge the Philadelphia Electric Company's right to exercise its power of eminent domain, but do challenge the *unlimited* extent to which the power was exercised, in this case, *without authority of law.* The appellants have and do now endeavor to induce the Philadelphia Electric Company to construct the line underground. They are convinced that, although the proposed aerial line would be justified 30 years ago, today, engineering being as advanced as it is, under the existing law the utility cannot now justify the construction of a line as proposed. This is so because the proposed aerial line requires *5 times the land necessary to do the job and is 20 times less efficient from the standpoint of outages* and does great damage to the state, township and community without any corresponding advantage to the public. In proof of this the evidence will disclose that to construct the aerial line, the Philadelphia Electric Company seeks to appropriate a right-of-way 150′ wide plus trimming rights of 50′ on each side thereof or a total width of 250′. Whereas, appellants' engineer and the Philadelphia Electric Company's engineer testified that if constructed underground a strip of land 50′ wide would be sufficient (see record 81a and 66a). Appellants' engineer, Mr. Garbett, testified that if the line was placed underground it would be 10 to 20 times more reliable from an outage standpoint (record 80a). These facts were not disputed by Philadelphia Electric Company.

The proposed aerial line destroys township zoning (record 95a), impairs the township tax structure (record

94a and 95a), prevents township planning, disregards a township ordinance requiring such lines to be placed underground (record 91a) and requires an excessive amount of appellants' land without any apparent advantage to the public since rates would not be lowered (record 56a):

The evil underlying the entire controversy is the deadly, dangerous concept promulgated by the Philadelphia Electric Company that the Company may appropriate *any amount* of land it desires without proving that the land appropriated is necessary to accomplish the public or corporate purpose. Further, the Public Utility Commission contends that it has no right or need to pass upon the question of whether or not the land is necessary for the public purpose. Also, the Company takes the position that it can construct any equipment it wants without proving that the equipment is necessary to accomplish the public purpose and further the Pennsylvania Public Utility Commission contends that it has no duty to pass upon the necessity for the equipment proposed, despite the very explicit provisions of the Act of 1889 (*supra*) to the contrary.

The Philadelphia Electric Company and the Pennsylvania Public Utility Commission contend that the only function of the Commission in complying with the Act of 1889 (*supra*) is to decide whether or not the service proposed is necessary or proper for the service, accommodation, convenience or safety of the public and by the same token there was not duty on the utility to submit proof that the land appropriated or the equipment proposed was necessary to accomplish the public or corporate purpose.

From the outset Appellants challenged the constitutionality of that part of the Second Class Township Law, May 1, 1933, P. L. 103 as amended, 53 P. S. 19093.2201 which is as follows:

"This act shall not repeal or modify any provisions of the Public Utility Law."

The legislature has provided Second Class Townships in the State of Pennsylvania with a very adequate township regulation. This Act of Assembly gives the townhips the right to tax the people, exercise the power of eminent domain, and provide for planning and zoning. Not only does a township have the powers specifically granted but it has those powers inherent and essential to give effect to powers expressly granted. Otherwise the express powers would be rendered nugatory. Nevertheless, the restriction imposed above, prevents the township from even passing the most reasonable legislation to protect those institutions and to give effect to powers expressly conveyed. Therefore, the provision is arbitrary and violates due process of law. The provision is invalid because it is repugnant and conflicting to the Act as a whole.

The Act of May 1, 1933 (*supra*) prevents communities with populations of thousands to pass reasonable legislation which may affect the Public Utility Code (a similar restriction is found in the First Class Township Law (53 P. S. 19092-3502)). Nevertheless, there is no such restriction on boroughs which may have a population of only a few hundreds. The population of Concord, a Second Class Township, is 2300. Contiguous and adjacent to the Township is the Borough of Chester Heights with a population of 490. Upper Darby Township, a First Class Township, has a population of 91,280. Second Class Townships as First Class Townships are restricted but boroughs are not. Today it is our townships which are receiving the large population and not the boroughs. The classification upon which the restriction is based is now outmoded and arbitrary. This provision of the Act is unconstitutional and Concord Township residents have been deprived of the equal protection of the law.

it was this restriction on the Second Class Township Law which was the basis of the case of Duquesne Light Company *v.* Upper St. Clair Township, *377 Pa. 323*, which was cited as an authority by the court in invalidating the township ordinance. If the Act of May 1, 1933 (*supra*) is unconstitutional as alleged, then the Concord township ordinance requiring overhead high tension lines in excess of 12,000 volts to be placed underground would be valid and enforcible. The proposed line in question would then have to be constructed underground.

Federal Questions Raised:

The Federal questions sought to be reviewed were raised in every stage of the proceedings before the Public Utility Commission, before the Superior Court and in application for appeal to the Supreme Court of Pennsylvania. Since the Philadelphia Electric Company in its answer to appellants' Petition for Stay falsely stated that the appellants did not raise the Federal questions below, the manner in which the questions were raised is set forth as follows. In appellants' Petition for Appeal to the Supreme Court of Pennsylvania the appellants listed the following as Assignments of Error.

"6. Your petitioners assign as error the decree of the Superior Court affirming orders of the Pennsylvania Public Utility Commission for the following reasons:

(d) That the Public Utility Commission failed to pass upon the question raised as to the necessity of the appropriation of the amount of land applied for nor did the Public Utility Commission pass upon the question of the necessity for the construction of the equipment proposed in violation of the duty imposed upon it by law. The Superior Court erroneously failed or refused to correct this failure on the part of the Public Utility Commission. Accordingly the

right to take the appellants' land has been granted and neither the Public Utility Commission nor the Superior Court has passed upon the necessity thereof nor the evidence adduced. This, therefore, amounts to the taking of appellants' land without due process of law in violation of Article I section 9 of the Pennsylvania Constitution (due process clause of the Pennsylvania Constitution).

(e) Further, if the Act of 1921, (Act of 1889 as amended) 15 P. S. 1181 permits the taking of land in this manner then the Act is unconstitutional in that it *violates the 14th Amendment of the United States Constitution in that it would be a State Act which permits the taking of land without due process of law*".

(l) the Superior Court failed to pass upon the issue raised as to the *constitutionality* of the restriction on Second Class Townships, Act of May 1, 1933, P. L. 103 as amended 53 P. S. 19093-2201, which is as follows:

> "This act shall not repeal or modify any of the provisions of the Public Utility Law".

The appellants' brief before the Pennsylvania Public Utility Commission alleges as follows on page 8:

> "That they (appellants) contend that the taking of a strip of land 250' wide is not necessary within the meaning of the Act of Assembly under which the applicant seeks the right to condemn land. Further the protestants contend that the proposed taking would be an unreasonable and arbitrary violation of their rights guaranteed by the Act of Assembly and the *Pennsylvania Constitution and the due process clause of the United States Constitution*".

On pages 5 and 6 of the Appellants' Brief before the Pennsylvania Public Utility Commission we find as follows:

> "The applicant takes the viewpoint that the only function of the Commission is to decide whether or not the service proposed is to the public interest and with this point the protestants cannot agree * * *: Therefore not only is it the Commission's *prerogative and duty to pass upon the necessity of the taking of the land but by the same token it is their prerogative and duty to pass upon the construction of the line* proposed".

The appellants' Petition in Appeal to the Superior Court of Pennsylvania set forth the following assignments of Error: The petition in the case of Paul L. Willits is used as an example. Petitions were filed for all other appellants but were substantially the same.

"10. Paul L. Willits assigns as error to the Order of the Commission the fact that the Commission capriciously and unreasonably disregarded the evidence adduced by the Protestants which proved that the amount of land to be taken by the applicant was excessive in that it was five times more than necessary to accomplish the proposed service.

11. Paul L. Willits assigns as error to the Order of the Commission the fact that the Commission capriciously and unreasonably failed or refused to pass upon the necessity for condemning the land sought to be appropriated by the applicant.

12. Paul L. Willits assigns as error to the Order of the Commission the fact that in approving the application to condemn the amount of land proposed and the construction of the equipment proposed the Commission arbitrarily

and capriciously disregarded testimony of the protestant proving that the construction of said transmission line as proposed would *violate the petitioner's rights as guaranteed by the Constitution of the United States.*

13. Paul L. Willits assigns as error to the Order of the Commission the fact that in approving the application to condemn the amount of land proposed and the construction of the equipment proposed the Commission arbitrarily and capriciously disregarded the testimony of the protestant proving that the construction of said transmission line as proposed would violate the Concord Township ordinance requiring the proposed transmission line to be placed underground."

Appellants' Brief before the Superior Court alleges as follows on page 27 issue 4:

> "Did the Commission err in failing to pass upon the necessity of constructing an overhead line and the appropriation of the excessive amount of land".

Questions 1 C(1), 1 C(2), 1 C(5) and 1 C(6) are contained in the above question which was discussed on page 27 to 31 of the appellants' Brief before the Superior Court. Pertinent excerpts are as follows: page 30

> "The failure of the Commission to predicate its adjudication on the evidence is a violation of the *14th Amendment of the United States Constitution*".

and further on page 31:

> "If the Act of 1889 (*supra*) permits the taking of the peoples' land without a proper adjudication, the Act itself would violate the *14th Amendment of the United States Constitution*".

Question 1 C(7) was raised before the Superior Court and on pages 18 and 19 of appellants' brief we find the following:

"Also the constitutionality of the restriction on the Second Class Township Law was never raised in the Birmingham Case. Appellants still contend that Concord Township ordinance does not violate the Public Utility Law, but, if that section of the Second Class Township Law May 1, 1933, P. L. 103 as amended 53 P. S. 19093-2201, is considered a bar to such action on the part of the Township, *then the constitutionality of that section is challenged for the following reasons*:

a. *The Pennsylvania Constitution* provides that no Pennsylvania act will deprive the people of the equal protection of the law. The Pennsylvania State Constitution, Article 16, section 3. provides:

"The exercise of the police power of the State shall never be abridged or so construed as to permit corporations to conduct their business in such a manner as to infringe the equal rights of individuals or the general well-being of the State" Constitution, Purdon's, Art. 16, Sec. 3.

"The *United States Constitution*, Article 14, section 1, provides:

"*Nor shall any state deprive any person of life, liberty, or property, without due process of law*".

Questions 1-C(3) and 1-C(4) pertaining to the Superior and Supreme Courts' failure to correct the Pennsylvania Public Utility Commission's failure to act were properly raised (page [illegible]).

The petitioners assign as error the decree of the Superior Court affirming the orders of the Pennsylvania Public Utility Commission for the following reason: 6 (a)

The Superior Court found that the approval of the application by the Commission is amply supported by the evidence. Whereas, in truth the intervening appellee, the Philadelphia Electric Company, *produced*

no evidence to substantitate or show that the equipment proposed was necessary nor that the amount of land taken was necessary for the purposes set forth in the application.

Likewise the Philadelphia Electric Company recognized the fact that constitutional questions were raised by the appellants and on page 11 of the Philadelphia Electric Company's Brief before the Superior Court we find the following:

"(c) Violation of Constitutional Rights. Appellants claim that the taking of a 150′ strip plus trimming rights of 50′ on each side thereof required for an overhead line is an arbitrary and capricious taking of land which violates both State and Federal constitutional rights of the property owners, since if the line were put underground only a 50′ strip wide would be necessary".

The Pennsylvania Public Utility Commission admitted that it did not pass upon the issues raised but tried to excuse its failure by saying that it felt that the Court had passed upon these issues in the Phillips case, *181 Penna. Superior Court 625.* This was a shameful dereliction since a reading of the Phillips case will disclose that the only issues raised therein pertain to the selection of the route. In the Phillips case no testimony was submitted nor was any challenge made as to the amount of land appropriated nor the necessity for the equipment to be used.

The pertinent part of the Public Utility Commission's Order sustaining the above is as follows:

"The property owners in their brief raise questions concerning (1) the necessity for the service to be furnished through the exercise of the right of eminent domain, (2) the necessity for the erection of

facilities for the transmission and distribution of electric power, and (3) the necessity for the particular appropriation. We feel that these questions have been resolved by the Superior Court's opinion in Alexander F. Phillips and Yuette C. Phillips *v.* Pennsylvania Public Utility Commission, No. 22 March term 1956, handed down on July 17, 1956. The court affirmed the Commission's approval of a similar application involving the identical line and held, in effect, that the Commission's approval was justified as an important factor in connection with the improvement of Philadelphia Electric Company's service.

Upon full consideration of all matters involved, we find that the service to be furnished by Philadelphia Electric Company through the exercise of the right of eminent domain, under the provisions of the Act of Assembly, approved May 21, 1921, P. L. 1057, in acquiring a right of way to enable the construction, operation and maintenance of a line or lines for the transmission or distribution of electricity over and across a tract of land herein referred to is necessary or proper for the service, accommodation, convenience or safety of the public, and that approval of the instant application should be granted".

The Superior Court did nothing to correct the grave error made by the Pennsylvania Public Utility Commmission in failing to consider the evidence produced and issues raised and in its order we find the following pertinent portion:

"We have stated that this court will not substitute its own judgment for that of the Commission unless the order is clearly unreasonable and not in conformity with the law, or where there is a flagrant abuse of discretion".

1 (d) *The Questions are Substantial.*

The right to take the appellants' land has been granted by the Pennsylvania Public Utility Commission and approved by the Superior Court and Supreme Court of Pennsylvania. However, the Philadelphia Electric Company has submitted no proof to show that the amount of land appropriated is necessary to accomplish the corporate purpose nor was there any proof to show that the equipment proposed (steel towers) was necessary to accomplish the public purpose. Further, although the Pennsylvania Public Utility Commission recognized the issues raised by the appellants, the Public Utility Commission considered the question irrelevant and accordingly did not investigate or adjudicate the issues raised. Under the legal concept promulgated by the Philadelphia Electric Company and as followed by the Pennsylvania Public Utility Commission and the Courts a utility could appropriate land in any amount without proof as to the necessity therefor and without the requirement of review by the Public Utility Commission contrary to the existing law.

CONCLUSION.

Accordingly for the reasons stated above, the questions presented are vital, important and so substantial that they should be resolved by your Honorable Court.

Respectfully submitted,

BASIL C. CLARE, ESQ.,
Attorney for Appellants

APPENDIX A.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application Docket No. 82294

In re: *Application of Philadelphia Electric Company—For approval of the exercise of the right of eminent domain by said company in acquiring a right of way for the construction, operation and maintenance of a line or lines for the transmission or distribution of electricity, over and across a tract of land in the Township of Concord, Delaware County, owned or reputed to be owned by Joseph B. Quig and Mary Ball Quig, his wife.*

ORDER

BY THE COMMISSION, August 20, 1956:

Philadelphia Electric Company filed this application on June 11, 1955, seeking Commission approval of the exercise of the right of eminent domain under the provisions of the Act of Assembly, approved May 21, 1921, P. L. 1057, in acquiring a right of way for the construction, operation and maintenance of a line or lines for the transmission or distribution of electricity over and across a tract of land in the Township of Concord, Delaware County, owned or reputed to be owned by Joseph B. Quig and Mary Ball Quig, his wife.

Applicant proposes to construct a 220,000 volt electric transmission line on steel towers from its proposed Chichester sub-station site in Lower Chichester Township, Delaware County, to its Bradford sub-station in East Bradford Township, Chester County, a distance of approximately 19.5 miles. Applicant's Bradford sub-station is located on the Conowingo-Plymouth Meeting 220,000

volt transmission line, which is directly interconnected with Pennsylvania Power & Light Company's line to its Siegfried sub-station near Allentown, Pennsylvania, and with the lines of Public Service Electric and Gas Company to its Roseland sub-station near Newark, New Jersey.

At the present time, the Bradford sub-station is connected to applicant's Chester generating station by 66,000 volt transmission lines which follow a circuitous route and which are tapped at various sub-stations en route. The proposed line will be directly connected with the Chester generating station and also with the applicant's proposed Eddystone generating plant, now under construction. Such direct connections will permit transmission of large blocks of power into the Chester-Marcus Hook industrial area. Industries in this area include oil refineries, ship building and steel production, all vital to the nation's peacetime economy and national defense. The proposed line will also strengthen interconnections with other Atlantic Seaboard utilities, thereby promoting greater service reliability, economy and protection.

Present 66,000 volt transmission lines from Chester and Philadelphia, now supplying electric power to the Chester-Marcus Hook area, are of limited capacity and cannot be used as a direct connection for high capacity bulk power transmission. The need, therefore, for a direct high capacity line is apparent if the continuing increase in industrial load is to be accommodated.

Beginning in 1951, applicant made studies of the area between the proposed Chichester sub-station site and its Bradford sub-station to determine the most feasible route for the proposed line wherein consideration was given to the terrain, location of dwellings and other improvements, as well as existing railroad rights of way. After selection of a tentative general route, property ownerships were established and the individual properties were checked to determine the reasonableness of the route with respect thereto.

The original route selected approached the proximity of Brandywine Battlefield Park of the Commonwealth of Pennsylvania. According to applicant's witness, the Battlefield Park Commission recommended adoption of another route to the west of the recently improved battlefield area. Subsequently, applicant's representatives met with groups of individuals and associations and discussed the general problem in an effort to develop a route that would be most reasonable and acceptable to the affected property owners. Applicant's witness indicated that, where practicable, the route selected traverses land having the lowest economic value of the general area.

The record shows that applicant's estimated cost of constructing the proposed line from the proposed Chichester sub-station site to the Bradford sub-station will be approximately $1,500,000 and that the route selected by applicant is feasible and will result in the least hardship to property owners involved. At the hearing, applicant's witness stated that a steel tower line of this type cannot be placed in service in less than two years following acquisition of the right of way. The new Eddystone power plant, which will be connected to the proposed line, is scheduled for completion in 1958.

The right of way sought by applicant for the construction of the proposed line across the tract of land owned by Joseph B. Quig and Mary Ball Quig, his wife, will be 150 feet in width with a centerline length of 1,448 feet. The proposed right of way will traverse approximately 500 feet of wooded land and approximately 900 feet of cultivated land and will occupy 5.08 acres. The area of the entire Quig tract is 89.25 acres.

Applicant's right of way agent stated that over a period of two years several contacts were made with the property owners or their representatives but that a satisfactory agreement could not be reached. This witness further stated that it was not practicable to reroute the proposed line to avoid the Quig tract. Applicant's witness

also stated that agreements have been reached with 44 of the 95 property owners whose land will be crossed by the proposed line.

Hearings were held in Media on October 18, 1955 and February 17, 1956 on this and companion eminent domain proceedings. Applicant filed a brief on December 16, 1955 and counsel for the property owner filed a brief on January 6, 1956. Oral argument was held on February 28, 1956, and applicant filed a reply brief on April 19, 1956.

The property owners in their brief raise questions concerning (1) the necessity for the service to be furnished through the exercise of the right of eminent domain, (2) the necessity for the erection of facilities for the transmission and distribution of electric power, and (3) the necessity for the particular appropriation. We feel that these questions have been resolved by the Superior Court's opinion in Alexander [redacted] Phillips and Yuette C. Phillips *v.* Pennsylvania Public Utility Commission, No. 22 March term 1956, handed down on July 17, 1956. The Court affirmed the Commission's approval of a similar application involving the identical line and held, in effect, that the Commission's approval was justified as an important factor in connection with the improvement of Philadelphia Electric Company's service.

Upon full consideration of all matters involved, we find that the service to be furnished by Philadelphia Electric Company through the exercise of the right of eminent domain, under the provisions of the Act of Assembly, approved May 21, 1921, P. L. 1057, in acquiring a right of way to enable the construction, operation and maintenance of a line or lines for the transmission or distribution of electricity over and across a tract of land herein referred to is necessary or proper for the service, accommodation, convenience to safety of the public, and that approval of the instant application should be granted;

THEREFORE, IT IS ORDERED:

1. That the instant application be and is hereby granted.

2. That approval of the exercise of the right of eminent domain by Philadelphia Electric Company in acquiring a right of way across a certain tract of land located on Concord Township, Delaware County, owned by Joseph B. Quig and Mary Ball Quig, his wife, be and is hereby granted, and that a certificate of public convenience issue in evidence of such approval.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

(signed) LEON SCHWARTZ, Chairman

Attest:

/s/ WILLIAM P. ROAN,
Secretary

Commissioner Sharfsin being absent, did not participate in the vote on the order.

APPENDIX B.

Paul L. Willits, Appellant,
No. 273 October Term, 1956,
William C. Morris et ux., Appellants,
No. 278 October Term, 1956
Township of Concord, Appellant,
No. 290 October Term, 1956,
Joseph B. Quig et ux., Appellants,
No. 33 October Term, 1957,
Basil C. Clare et ux., Appellants,
No. 34 October Term, 1957,
Charles R. Johnson, Appellant,
No. 35 October Term, 1957,
Minshall P. Sharpless, Appellant,
No. 59 October Term, 1957,
Aruthur N. Sanborn et ux., Appellants,
No. 60 October Term, 1957,
George A. Kinney et ux., Appellants,
No. 61 October Term, 1957

v.

Pennsylvania Public Utility Commission, Appellee,
Philadelphia Electric Company, Intervening Appellee

In the Superior Court of Pennsylvania

Nos. 273, 278 and 290 October Term, 1956

and

Nos. 33 to 35, and 59 to 61 October Term, 1957

Appeals from the Orders of the Pennsylvania Public Utility Commission at Docket Nos. A. 82298, A. 82291, A. 82294, A. 82505, A. 82652, A. 82295, A. 82554, A. 82296.

FILED: December 28, 1956

Opinion by Gunther, *J.*

Appellants here are seeking reversal of the eight orders of the Public Utility Commission approving a-

plications of Philadelphia Electric Company to exercise the right of eminent domain to acquire rights of way for the construction, operation and maintenance of a line for transmission or distribution of electricity. On August 25, 1956, we entered an order consolidating appeals Nos. 273, 278 and 290 October Term, 1956 for purposes of briefs and arguments, and we later allowed the remaining six cases herein involved to be consolidated for brief and argument.

In June, 1955, the Philadelphia Electric Company applied to the Public Utility Commission for approval to condemn a strip of land 150 feet wide for a right of way, and, in addition thereto, 50 feet on each side thereof for the purpose of trimming trees across appellants' properties. The company proposes to construct a 220,000 volt aerial electric transmission line between its Bradford Substation in East Bradford Township, Chester County, and its Chichester Substation in Lower Chichester Township, Delaware County. To this application answers were filed by appellants who challenged the application on the ground that the land to be condemned was not for a public use and that the facilities and equipment proposed to be constructed were not necessary within the meaning of the Act of May 21, 1921, P. L. 1057, 15 P. S. 1182. The Township of Concord upon petition, was permitted to intervene, challenging the application on the ground that the granting of such application would violate its ordinance regulating the construction of the proposed line. Hearings on the application were held on October 18, 1955 and February 17, 1956, relating to the Morris property, and subsequent hearings were held on the applications relating to the other appellants, but with the exception of the evidence produced by Philadelphia Electric Company, relating specifically to the individual property in question, the record in each of these other cases was made through incorporation by reference of the direct testimony and cross-examination in the Morris case. Thus, a determination of the Morris appeal

will dispose of the others. After hearings, the Commission entered orders approving the applications and issued certificates of public convenience and necessity.

In Phillips *v.* Pennsylvania Public Utility Commission, 181 Pa. Superior Ct. 625, 124 A. 2d 625, we have ruled on the questions of necessity and selection of route covering the proposed line here involved. We shall not repeat here what we said in that case. Upon a review of the record in the instant appeals we find that approval of the application by the Commission is amply supported by the evidence. Nor do appellants seriously challenge the question of necessity; instead, they devote their contentions mainly to whether the line should be placed underground instead of overhead and whether by underground construction the cost would be reduced which ultimately would reduce the rate to be charged.

We are not concerned here with a rate case nor the costs which form the basis of a rate case. The question of comparative costs was considered by the Commission between overhead and underground lines in determining whether the route selected was arbitrary, wanton or capricious. We have stated that this Court will not substitute its own judgment for that of the Commission unless the order is clearly unreasonable and not in conformity with the law, or where there is a flagrant abuse of discretion. Phillips *v.* Pennsylvania Public Utility Commission, *supra*.

Appellants claim that the 150 foot strip to be taken for the right of way, plus the trimming rights for 50 feet on each side thereof is arbitrary and capricious and in violation of the Constitution, Article I, Section 10. In view of the fact that appellants do not dispute the testimony of the Company that a 150 foot right of way is necessary for an overhead line, and in view of the fact that whatever damages are ascertained must be paid to the property owners, we cannot agree with this contention.

The contentions of the intervening appellant, Concord Township, to the effect that such proposed line would

violate the ordinance regulating the construction of such lines, that the taking of the proposed 150 foot strip would deprive the township of tax revenue are without merit. The regulation of utilities, the rendering of adequate and efficient service, and the making of necessary changes rest, in the first instance, with the Commission. This control, in the interest of service to the public, transcends the legitimate objectives of any one of the political subdivisions of the Commonwealth. Duquesne Light Company *v.* The Township of Upper St. Clair, 377 Pa. 323, 105 A. 2d 287. The attempt to regulate the manner of construction of electrical transmission lines is unenforceable. Lower Chichester Township *v.* Pennsylvania Public Utility Commission, 180 Pa. Superior Ct. 503, 119 A. 2d 674. The mere fact that a political subdivision is deprived of possible tax revenue has never been considered controlling in eminent domain proceedings.

We have examined the case of Winger *v.* Aires, 371 Pa. 242, 89 A. 2d 521 cited by appellants but do not consider it as controlling the instant case.

The orders of the Commission are affirmed.

APPENDIX C.

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Philadelphia 7
April 9, 1957

Basil C. Clare, Esq.
822 Butler Street
Chester, Pennsylvania

Re: Paul L. Willets, et al.
v. Pennsylvania Public Utility
Commission and
Philadelphia Electric Company
No. 458-A Miscl. Docket No. 10

Dear Sir:

Please be advised that the Court has entered the following Order on your Petition for Allowance of a Supersedeas in the above entitled matter:

"April 8, 1957, petition denied.
PER CURIAM"

Very truly yours,
/s/ CHARLES H. McKIBBEN
Prothonotary

CHMcK:esm
cc: Vincent P. Butler, Esq.
Philadelphia Electric Company
1000 Chestnut Street
Philadelphia 5, Pa.

Thomas M. Kerrigan, Esq.
Acting Counsel
Penna. Public Utility Commission
127 North Office Building
Harrisburg, Penna.

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SUPREME COURT, U.S.

FILED
JUL 5 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 134

PAUL L. WILLITS, et al.,
Appellants,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellee,

PHILADELPHIA ELECTRIC COMPANY,
Intervening Appellee

Appeal from the Supreme Court of the Commonwealth of Pennsylvania

BRIEF OPPOSING MOTIONS TO DISMISS

BASIL C. CLARE,
Attorney for Appellants.

822 Butler Street,
Chester, Pennsylvania.

PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956. No. 1023.

Paul L. Willits, et al.,

Appellants,

v.

Pennsylvania Public Utility Commission,

Appellee,

Philadelphia Electric Company,

Intervening Appellee.

BRIEF OPPOSING MOTIONS TO DISMISS.

A. STATEMENT OF THE CASE.

Requirements of Rule 40 of the Supreme Court of the United States, such as statement of the case, questions presented for review are set forth in appellants Jurisdictional Statement and so are not repeated in this brief which is intended to reply to the arguments made by appellees in their Motion to Dismiss.

B. ARGUMENT.

The appellants oppose Motion to Dismiss of the Pennsylvania Public Utility Commission as follows:

Beginning with P. 2 of its Motion to Dismiss Appeal —the Pennsylvania Public Utility Commission endeavors

to convince the court that it has no duty to pass upon the issues raised by the appellant and the evidence submitted in support thereof by stating that the issuance of a certificate confers by the Pennsylvania Public Utility Commission a preliminary approval only. The language used, however, is just another way of saying that the final decision as to the right to and extent of an appropriation is for the court finally. With this there is no disagreement but that fact does not give the Pennsylvania Public Utility Commission the right to ignore the issues raised and evidence submitted otherwise the court cannot adequately determine the issues on review.

The Pennsylvania Public Utility Commission has a duty to inquire into the amount of land being appropriated and the necessity of the equipment being proposed because:

1. The Act of 1889 as amended by the Act of 1921, 15 P. S. 1182, sub-sections A and B imposes a duty of review by the Pennsylvania Public Utility Commission since that Act grants to the Utility the right to appropriate only that land which is necessary and the right to construct that equipment and the facilities which are necessary. Accordingly, the Pennsylvania Public Utility Commission must review the evidence to determine whether or not land appropriated and equipment proposed is necessary to accomplish the corporate purpose.

2. The Pennsylvania Constitution imposes a limitation upon eminent domain. Article 1, Section 10, provides that no private property shall be taken without authority of the law. It would require a review of the evidence by the Pennsylvania Public Utility Commission to determine whether or not the appropriation exceeded the limits permitted by the law.

3. The court's decisions require the Pennsylvania Public Utility Commission to consider and pass upon the

evidence. In *the case of Dickson, appellant* v. *P. S. C., 89 Pa. Superior Court 126, at page 134*, the court said:

> "We agree with the protestants that the land sought to be condemned must be necessary for the corporate use in transmitting electricity and that this necessity must be passed upon by the Commission before the power is exercised."

4. The Pennsylvania Public Utility Code imposed a duty of inquiry upon the Pennsylvania Public Utility Commission. The Act of 1937, May 23, P. L. 1053, Article 4, Section 413, 66 P. S. 1183, provides that the Commission shall determine and prescribe by regulation or order the reasonable, safe, adequate, sufficient service or facilities to be observed by the Utility.

5. The federal authorities require the Pennsylvania Public Utility Commission to evaluate the issues raised and the evidence submitted. The case of *Railroad Commission of California* v. *Pacific Gas and Electric Company, 302, U. S. 388, 58 S. Court 334*, states that "the Commission must act upon the evidence and not arbitrarily". And in the case of *N. L. R. B.* v. *Burns, 207 F. 2nd 434*, the court held that a refusal by the administrative body to receive and consider competent material evidence offered by a party to the proceeding amounts to a denial of due process of law.

6. If the Pennsylvania Public Utility Commission has no duty to consider the evidence and pass upon the issues then the Utility may appropriate land in any amount and without restriction. This concept is contrary to the principles laid down in the case of *Winger* v. *Aires, 371 Pa. 242*, which holds that no authority under the law is unlimited.

The appellants have not at any stage of the proceedings challenged the Philadelphia Electric Company's right to select its route and accordingly the authorities

beginning with the citation *Biddle* v. *P. S. C., 81 Pa. Superior Ct. 350,* are completely irrelevant. None of the cases cited provide that the Pennsylvania Public Utility Commission need not pass upon the issues or the evidence submitted.

As to arugment (A) P. 5 Pa. P. U. C. Motion to Dismiss.

The appellants have challenged the constitutionality of the Act of 1889 as amended by the Act of 1921, 15 P. S. 1181, and 1182 sub-sections A and B since it has permitted the taking of appellants' land without due process. The cases cited by the Pennsylvania Public Utility Commission—*Ferry* v. *King County, 141 U. S. 668 and Madison Traction Company* v. *St. Bernard Min. Co., 25 S. Ct. 251,* do not in either subject matter or language support the position of the Pennsylvania Public Utility Commission.

As to argument (B) P, 7 Pa. P. U. C. Motion to Dismiss.

The appellants submitted technical evidence, filed briefs and argued the matter before the Pennsylvania Public Utility Commission and the Superior Court but the evidence submitted and issues raised were not considered by the Pennsylvania Public Utility Commission nor was this failure to consider the issues and evidence corrected by the Superior Court and consequently the appellants had no hearing at all. *N. L. R. B.* v. *Burns, 207 F. 2nd 434.*

The appellants oppose Motion to Dismiss of the Philadelphia Electric Company as follows:

The Philadelphia Electric Company predicates its position on the cases of *Harding* v. *Illinois, 196 U. S. 78, 88; Capital City Dairy Co.* v. *Ohio, 183 U. S. 238; Herndon* v. *Georgia, 259 U. S. 441.* In the case of *Harding* v.

Illinois (supra), the appellant made some effort to raise the Federal question before the lower court but did not argue or raise the question before the appellate court and the court held that the appellants had waived its Federal right by implication.

In the case of *Capital City Dairy Co.* v. *Ohio (supra)*, the appellants did not specify the clause of the constitution relied on and further it did nothing to show that the attention of the State Court was directed to the question.

In *Herndon* v. *Georgia (supra)*, the Federal question was not presented in any form to the state appellate court and so the U. S. Supreme Court refused to consider the question.

However these cases have no application to the case at hand since every tribunal below has had an opportunity to pass upon the questions involved. On page 3 of Philadelphia Electric Company's Motion to Dismiss the issues raised before the Superior Courts of Pennsylvania by the appellants are set forth. Question 4 is chiefly the basis of this appeal. In argument before the Pennsylvania Public Utility Commission appellants argued that the Commission was required to pass upon the question of necessity for the amount of land to be appropriated and the necessity for the construction of the equipment proposed. The Philadelphia Electric Company argued that the issues were not relevant. When the Pennsylvania Public Utility Commission failed to pass upon the issues and consider the evidence the appellants set forth in their Petition for Appeal to the Superior Court this failure as one of their assignments of error. See Jurisdictional Statement, pp. 13 and 14.

In support of issue 4 (*supra*) the appellants argued that the Pennsylvania Public Utility Commission's failure to pass upon the evidence or consider the issues raised was a violation of due process as guaranteed by the fourteenth amendment of the United States Constitution (see Jurisdictional Statement. p. 14); so that the Superior

Court's attention was called directly to the Federal question. The Federal question was suggested by issue 4 (*supra*) in compliance with Pa. Superior Court Rule 34, which reads in part:

> "No point will be considered which is not set forth in the Statement of Questions Involved or *suggested thereby.*"

When the Superior Court failed or refused to correct the Pennsylvania Public Utility Commission's failure to consider the evidence or issues the appellants in its Petition for Appeal to the Supreme Court of Pennsylvania listed the court's failure as an assignment of error. This fact is set forth in Jurisdictional Statement on pages 11 and 12, but in view of the Philadelphia Electric Company's endeavor to minimize and distort the assignment made, it is repeated as follows (6 D and E must be read together):

> "6. Your petitioners assign as error the decree of the Superior Court affirming orders of the Pennsylvania Public Utility Commission for the following reasons:
>
> (*d*) That the Public Utility Commission failed to pass upon the question raised as to the necessity of the appropriation of the amount of land applied for nor did the Public Utility Commission pass upon the question of the necessity for the construction of the equipment proposed in violation of the duty imposed upon it by law. The Superior Court erroneously failed or refused to correct this failure on the part of the Public Utility Commission. Accordingly, the right to take the appellants' land has been granted and neither the Public Utility Commission nor the Superior Court has passed upon the necessity thereof nor the evidence adduced. This, therefore, amounts to the taking of appellants' land without due process

of law in violation of Article I section 9 of the Pennsylvania Constitution (due process clause of the Pennsylvania Constitution).

(e) Further, if the Act of 1921, (Act of 1889 as amended) 15 P. S. 1181 permits the taking of land in this manner then the Act is unconstitutional in that it *violates the 14th Amendment of the United States Constitution in that it would be a State Act which permits the taking of land without due process of law.*"

The case of *Live Oak Association* v. *Railroad Commission, 269 U. S. 354, 357-358* and the case of *Lynch* v. *New York ex rel. Pierson, 293 U. S. 52, 54* are not relevant to the issue at hand.

C. CONCLUSION.

For the foregoing reasons your honorable court is requested to find that the Federal questions sought to be reviewed were properly and timely raised; and, therefore, motions of the appellees should be dismissed.

Respectfully submitted,

BASIL C. CLARE,
Attorney for Appellants.

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FILED
JUN 17 1957
JOHN T. FEY, Clerk

IN THE
Supreme Court of the United States

Term,

No. 134

PAUL L. WILLITS ET AL.,
Appellants

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellee

PHILADELPHIA ELECTRIC COMPANY,
Intervening Appellee

Appeal from the Supreme Court of the Commonwealth of Pennsylvania

MOTION TO DISMISS APPEAL

JACK F. ASCHINGER
Assistant Counsel
HOWARD L. CRIDEN
Assistant Counsel
THOMAS M. KERRIGAN
Acting Counsel
For Pennsylvania Public Utility Commission

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Harrisburg, Pennsylvania

Morrelle Printing Company, Law Printers, 201-203 Lockhart Street, Sayre, Pa.

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IN THE SUPREME COURT OF THE UNITED STATES

Term,

No.

Paul L. Willits et al.,
Appellants

v.

Pennsylvania Public Utility Commission,
Appellee

Philadelphia Electric Company,
Intervening Appellee

I.

MOTION TO DISMISS APPEAL

Pennsylvania Public Utility Commission, by Jack F. Aschinger, Howard L. Criden, Assistant Counsel, and Thomas M. Kerrigan, Acting Chief Counsel, moves the Supreme Court of the United States to dismiss the appeal of Paul L. Willits et al., from orders of the Pennsylvania Public Utility Commission as affirmed by the Superior Court of Pennsylvania in *Paul L. Willits et al. v. Pa. P.U.C. et al.*, 183 Pa. Superior Ct. 62, 128 A. (2) 105 (1956), the Supreme Court of Pennsylvania denying "Per Curiam" on February 28, 1957, appellants' Petition in Appeal from the Opinion and Order of the Superior Court of Pennsylvania.

II.

NATURE OF THE CASE AND RULING BELOW

The opinion and order of the Superior Court, dated December 28, 1956, affirmed the orders of the Public Utility Commission approving applications of Philadelphia Electric Company to exercise, under the Act of May 21, 1921, P. L. 1057 (15 P.S. 1182), the right of eminent domain to acquire rights of way for the construction, operation, and maintenance of a line for transmission and distribution of electricity.

Under the Act of 1921, supra, light, heat, or power companies have the right of eminent domain. Among other provisions, it requires the preliminary approval of the Commission. On this point, the Act provides that before any such company shall exercise the power, the Public Service Commission (now Public Utility Commission) shall find and determine, after public hearing, that the service to be furnished by the company through the exercise of the power is necessary or proper for the service, accommodation, convenience, or safety of the public. (All damages shall be ascertained, recovered, and paid as provided by the Act of 1874, Section 41, in the Court of Common Pleas of the proper county.)

Following the Act of 1921, the Pennsylvania Superior Court had occasion to define the function of the Commission in a number of decisions. The grant of a certificate by the Commission approving the exercise of the power of eminent domain under the provisions

of the Act of 1921 does not determine the right of the utility to condemn the lands it desires to appropriate or the validity of the subsequent proceedings by eminent domain. It evidences only the preliminary approval of the Commission, and is a finding that the exercise of the power, if it exists, is necessary for the convenience, accommodation, or safety of the public. The selection of the route for the lines is a matter for the light company in the first instance, and unless it is shown that it proposes to exercise the power conferred upon it wantonly, corruptly, or capriciously, or that the rights of the landowner have been trifled with, or unreasonably disregarded, the law does not contemplate that the Commission should withhold its approval simply because another route might have been adopted. *Biddle v. P.S.C.*, 81 Pa. Superior Ct. 350 (1923); *Kulp v. P.S.C.*, 82 Pa. Superior Ct. 83 (1923); *Reiber v. P.S.C.*, 83 Pa. Superior Ct. 507 (1924); *Dickson v. P.S.C.*, 89 Pa. Superior Ct. 126 (1926); *Wilson v. P.S.C.*, 89 Pa. Superior Ct. 352 (1926); *Biddle v. P.S.C.*, 90 Pa. Superior Ct. 570 (1927); *Westside Electric St. Ry. v. P.S.C.*, 91 Pa. Superior Ct. 162 (1927); and *Dickel v. Bucks-Falls Elec. Co.*, 306 Pa. 504, 160 Atl. 115 (1932). The holdings of these cases have been followed more recently by our appellate courts without question: *Reed v. Pa. P.U.C.*, 174 Pa. Superior Ct. 132, 100 A. (2) 399 (1953); *Byers v. Pa. P.U.C.*, 176 Pa. Superior Ct. 620, 109 A. (2) 232 (1954); *Phillips v. Pa. P.U.C.*, 181 Pa. Superior Ct. 625, 124 A. (2) 625 (1956); and *Duquesne Light Co. v. Upper St. Clair*, 377 Pa. 323, 105 A. (2) 287 (1954).

The Superior Court of Pennsylvania in *Phillips v. Pa. P.U.C.*, 181 Pa. Superior Ct. 625, 124 A. (2) 625

(1956), ruled on the questions of necessity and selection of the route covering the proposed line here involved, and found in the instant cases involving the identical line that approval of the applications by the Commission was amply supported by the evidence and in conformity with the law.

Appellants sought an allowance of appeal in the Supreme Court of Pennsylvania. The Supreme Court refused to allow the appeal. Appellants now seek review by the Supreme Court of the United States.

III.

ARGUMENT IN SUPPORT OF MOTION TO DISMISS

(A) There is no jurisdiction, under the provisions of Title 28, U. S. Code, Section 1257(2) for this appeal.

The statutory provision which is relied upon by appellant to sustain the jurisdiction of the Supreme Court of the United States to review the decision involved is Section 1257(2) of Title 28, U. S. Code.

The portion of that section of the Judicial Code upon which appellant relies is that portion which reads as follows:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> *(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.*" (Italics ours)

It is submitted that appellants' statement of the case merely goes to the amount of land appropriated by the proposed aerial line in comparison with underground construction and does not present a federal question for review within Section 1257(2).

The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed: *Ferry v. King County*, 141 U. S. 668, 35 L. Ed. 895 (1891). Speaking generally, it is for the state, primarily and exclusively, to declare for what local public purposes private property within its limits may be taken upon compensation to the owner, as well as to prescribe a mode in which it may be condemned and taken: *Madison Traction Co. v. St. Bernard Min. Co.*, 25 S. Ct. 251, 49 L. Ed. 462, 196 U. S. 239 (1905); *Stone v. Southern Illinois & M. Bridge Co.*, 27 S. Ct. 615, 51 L. Ed. 1057, 206 U. S. 267 (1907).

(B) There is no substantial federal question presented in this appeal.

Appellants contend that they have been deprived of rights as guaranteed by the Constitution of the United States. Primarily they contend that the failure of the Commission to predicate its adjudication on the evidence is a violation of the 14th Amendment of the United States Constitution.

It is submitted that at all stages of the proceeding before the Pennsylvania Commission and the appellate courts of Pennsylvania, appellant had a full hearing, the right to file a brief, and the right to orally argue this matter before the Commission and Court, and full opportunity to meet all the issues in this proceeding. The right of review to determine whether the findings of the Commission are based upon substantial evidence or whether they are arbitrary, oppressive, and therefore in excess of its powers, and whether the order made is responsive to and justified by such findings, satisfies the requirement of due process: *Arkansas Wholesale Grocers' Ass'n. v. Federal Trade Com'n.*, 18 F. (2) 866 (1927), certiorari denied, 275 U. S. 533, 48 S. Ct. 30, 72 L. Ed. 411 (1927); *Asbury Truck Co. v. Railroad Commission of California*, 52 F. (2) 263 (1931), affirmed per curiam; 287 U. S. 570, 53 S. Ct. 94, 77 L. Ed. 501.

A proceeding merely involving the power and duty of the Pennsylvania Public Utility Commission, under the Act of 1921, to find and determine preliminarily

whether the service to be furnished by the company through the exercise of the right of eminent domain is necessary or proper for the service, accommodation, convenience, or safety of the public presents no exceptional features which justify special review.

Conclusion

The appeal of Paul L. Willis et al., should be dismissed because (1) there is no jurisdiction, under the provisions of Title 28, U. S. Code, Section 1257(2) for this appeal, and (2) there is no substantial federal question involved in this appeal.

Respectfully submitted,

JACK F. ASCHINGER
Assistant Counsel

HOWARD L. CRIDEN
Assistant Counsel

THOMAS M. KERRIGAN
Acting Counsel
For Pennsylvania Public
Utility Commission

CERTIFICATE OF SERVICE

I have this day mailed to all counsel of record herein copies of the within Motion to Dismiss in postpaid, properly addressed covers.

THOMAS M. KERRIGAN
Acting Counsel

Dated June 13, 1957

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Office - Supreme Court, U.S.
FILED
JUN 20 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956 No. ~~1022~~ ~~No. 1023~~ 134

PAUL L. WILLITS, et al.,
Appellants,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellee,

PHILADELPHIA ELECTRIC COMPANY,
Intervening Appellee

Appeal from the Supreme Court of the Commonwealth of Pennsylvania

MOTION TO DISMISS APPEAL

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PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956 No. 1023

Paul L. Willits, et al.,
Appellants,

v.

Pennsylvania Public Utility Commission,
Appellee,

Philadelphia Electric Company,
Intervening Appellee.

MOTION TO DISMISS APPEAL.

Philadelphia Electric Company, intervening appellee, moves that the appeal herein be dismissed on the grounds that the federal questions sought to be reviewed were neither timely nor properly raised nor expressly passed on.

STATEMENT OF THE CASE.

This is an appeal from an order of the Supreme Court of Pennsylvania entered on February 28, 1957, denying appellants' petition for allowance of an appeal from a judgment of the Superior Court of Pennsylvania.

Appellants had appealed to the Superior Court of Pennsylvania from various orders of the Pennsylvania Public Utility Commission approving applications of the

Philadelphia Electric Company to exercise, under the Act of May 21, 1921, P. L. 1057, 15 P. S. 1182, the right of eminent domain to acquire rights of way for the construction, operation and maintenance of a line for the transmission of electricity (Bradford-Chichester Transmission Line). The orders of the Public Utility Commission had not passed upon any federal questions.

In an opinion dated December 28, 1956, the Superior Court affirmed the orders of the Public Utility Commission. The Superior Court did not pass upon any federal questions. As heretofore indicated, the Supreme Court of Pennsylvania, in its *Per Curiam* order of February 28, 1957, denied appellants' petition for allowance of an appeal.

On April 8, 1957, the Supreme Court of Pennsylvania entered a *Per Curiam* order denying appellants' petition for allowance of supersedeas, and on May 2, 1957, appellants' application for a stay was denied by this Honorable Court.

ARGUMENT.

The opinion of the Superior Court of Pennsylvania (Jurisdictional Statement, P. 24) shows clearly that the Superior Court did not pass upon any federal questions in the proceedings below. It is equally clear why the court did not pass upon any federal questions. Rule 34 of the Rules of the Superior Court, referring to the contents of briefs on appeal, provides as follows:

> "Rule 34. The statement of the questions involved must state the question or questions in the briefest and most general terms, without names, dates, amounts or particulars of any kind. It should not ordinarily exceed fifteen lines, must never exceed one page, and must always be printed on the first page of the Brief, without any other matter appearing thereon. *This rule is to be considered in the highest degree manda-*

tory, admitting of no exception; ordinarily no point will be considered which is not set forth in the statement of questions involved or suggested thereby." (Emphasis supplied.)

In appellants' Consolidated Brief before the Superior Court, they made no attempt to raise any federal questions in their Statement of Questions Involved, which was as follows:

"STATEMENT OF QUESTIONS INVOLVED

"1. Is the appropriation of that land in excess of a fifty foot strip as proposed by the Philadelphia Electric Company necessary within the meaning of the Act of Assembly?

"2. Is the equipment proposed to be used by the Philadelphia Electric Company in transmitting power necessary within the meaning of the Act of Assembly?

"3. Is that land in excess of the fifty foot strip to be appropriated by the Philadelphia Electric Company for a public use?

"4. Did the Commission err in failing to pass upon the necessity of constructing an overhead line and the appropriation of the excessive amount of land?"

In appellants' Petition in Appeal to the Superior Court one of the assignments of error (Jurisdictional Statement, P. 13-14, No. 12) complained that the Public Utility Commission had disregarded testimony of appellants allegedly proving that the construction of the transmission line as proposed "would violate the petitioner's rights as guaranteed by the Constitution of the United States." However, such vague allusions to "the Constitution of the United States," without further specificity, do not properly raise a federal question. *Harding* v. *Illinois*, 196 U. S. 78, 88; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238; *Herndon* v. *Georgia*, 295 U. S. 441.

"A question not raised in nor considered by the tribunal below will be ignored on appeal; it must also be ignored if not included in any assignment of error." *Borough of Middletown* v. *Pennsylvania Public Utility Commission*, 143 Pa. Superior Ct. 444. And the proper method of raising the federal question is determined by State practice. *Central Union Co.* v. *Edwardville*, 269 U. S. 190; *Pennsylvania R. Co.* v. *Illinois Brick Co.*, 297 U. S. 447; *Parker* v. *Illinois*, 333 U. S. 571.

It is evident, therefore, that when none of the tribunals below passed upon any federal questions it was for the reason that appellants had failed timely and properly to raise any such questions. When the federal questions are not timely and properly raised in the state court and that court is completely silent on such questions, this Honorable Court assumes the silence to be due to the procedural deficiency. *Bailey* v. *Anderson*, 326 U. S. 203.

Appellants' attempt to show that in their Petition for Appeal to the Supreme Court of Pennsylvania there was included an assignment of error to the effect that "if the Act of 1921 (Act of 1889 as amended), 15 P. S. 1181 permits the taking of land in this manner then the Act is unconstitutional in that it violates the 14th Amendment of the United States Constitution . . ." (Jurisdictional Statement, P. 12). Apart from the merits of the question, it is clear that, as previously shown, it came too late, having been neither raised before nor passed upon by the Superior Court. Furthermore, appellants' attempt to show, by citations to their briefs in the proceedings below, that federal questions were properly and timely raised is without merit, since briefs before the state courts cannot be used to establish that a federal question was raised. *Live Oak Association* v. *Railroad Commission*, 269 U. S. 354, 357-358; *Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52, 54.

CONCLUSION.

For the foregoing reasons the appeal herein should be dismissed on the grounds that the federal questions sought to be reviewed were neither timely nor properly raised, nor expressly passed on by the State Courts.

Respectfully submitted,

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